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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 704

JAMES SHAY AND SUSIE V. BROWN,
Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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To the Honorable the Chief Justice of the United States and the Honorable Associate Justices of the Supreme Court of the United States:

The petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit affirming judgments of conviction in criminal case entered February 19, 1954.

Opinions Below

There was no opinion in the District Court.

The opinion of the United States Court of Appeals for the District of Columbia Circuit rendered on February 19,

1954 is not yet reported but is printed on page 177 of record filed herein.

Jurisdiction

The jurisdiction of this Court is invoked under Rule 37 (b) of the Federal Rules of Criminal Procedure and Title 28, par. 1254, United States Code.

The judgment of the United States Court of Appeals was entered February 19, 1954. On March 12, 1954 The Chief Justice extended the time for filing a petition for writ of certiorari to and including April 20, 1954.

Questions Presented

I

Whether within the meaning of Rule 41 (g) Federal Rules of Criminal Procedure such a "*Special Provision is Made*" regulating the issuance, form and execution of search warrants by a statute (23-301 D. C. Code), as would prohibit modification of its requirements that "the warrant shall have annexed to it or inserted therein a copy of the affidavit upon which it is issued"?

II

Whether "Probable Cause" as defined by Amendment IV is shown by an affidavit upon which a search warrant is issued when the affidavit recites the observation of conduct or activity otherwise lawful and innocent except for the belief of the affiant and where no grounds or reasons are given for such belief?

III

Where policemen enter premises without a warrant, arrest persons therein and begin a search, are the requirements of Amendment IV satisfied by the subsequent entry of a Deputy United States Marshal with a search warrant?

IV

Where officers are suspicious that contraband is concealed within a premises and an individual had been seen to enter and leave the premises on three previous occasions, is the arrest and search of that individual without a warrant outside the premises upon his departure therefrom violative of his rights under the Amendment IV?

Statutes and Rules Involved

Title 23, Section 301 District of Columbia Code (1951 ed.):

> "Upon complaint, under oath, before the police court, or a United States commissioner, setting forth that the affiant believes and has good cause to believe that there are concealed in any house or place articles stolen, taken by robbers, embezzled, or obtained by false pretenses, forged or counterfeited coins, stamps, labels, bank bills, or other instruments, or dies, plates, stamps, or brands for making the same, books or printed papers, drawings, engravings, photographs, or pictures of an indecent or obscene character, or instruments for immoral use, or any gaming table, device, or apparatus kept for the purpose of unlawful gaming, or any lottery tickets or lottery policies, or any book, paper, memorandum, or device for or used in recording any bet or deposit of money or thing or consideration of value received for any share, ticket, certificate, writing, bill, slip, or token in any pool or lottery or as a wager on or in connection with any race, game contest, election, or other gambling transaction or device of an unlawful nature as defined in sections 22-1501, 22-1503, 22-1504, 22-155, 22-1507, 22-1508, particularly describing the house or place to be searched, the things to be seized, substantially alleging the offense in relation thereto, and describing the person to be seized, the said court or United States commissioner may issue a warrant either to the marshal or any officer of

the Metropolitan Police commanding him to search such house or place for the property or other things, and, if found, to bring the same, together with the person to be seized, before the police court or United States commissioner issuing said warrant, as the case may be.

"The said warrant shall have annexed to it, or inserted therein, a copy of the affidavit upon which it is issued, and may be substantially in the form following:

" 'Whereas there has been filed before — an affidavit, of which the following is a copy (here insert). These are therefore to command you to enter (here describe the place) and there diligently search for the said articles, goods, or chattels in the said affidavit described, and that you bring the same, or any part thereof, found on said search and also the body of — before the police court, or United States commissioner, as the case may be, to be dealt with and disposed of according to laws.'

(Mar. 3, 1901, 31 Stat. 1337, ch. 854 #911; Apr. 5, 1938, 52 Stat. 199, ch. 72, #3.)"

Rule 41 (c) Federal Rules of Criminal Procedure:

"Issuance and Contents. A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property

specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned."

Rule 41 (g) Federal Rules of Criminal Procedure:

"Scope and Definition. This rule does not modify any act, inconsistent with it, regulating search, seizure, and the issuance and execution of search warrants in circumstances for which special provision is made. The term "property" is used in this rule to include documents, books, papers and any other tangible objects. As amended Dec. 27, 1948, effective Oct. 20, 1949."

Title 22, Section 1501 District of Columbia Code (1951 ed.):

"If any person shall within the District keep, set up, or promote, or be concerned as owner, agent, or in any other manner, in managing, carrying on, promoting, or advertising, directly or indirectly, any policy lottery, policy shop, or any lottery, or shall sell or transfer any chance, right, or interest, tangible or intangible, in any policy lottery, or any lottery or shall sell or transfer any ticket, certificate, bill, token, or other device, purporting or intended to guarantee or assure to any person or entitle him to a chance of drawing or obtaining a prize to be drawn in any lottery, or in a game or device commonly known as policy lottery, or policy or shall, for himself or another person, sell or transfer or have in his possession for the purpose of sale or transfer, a chance or ticket in or share of a ticket in any lottery or any such bill, certificate, token, or other device, he shall be fined upon conviction of each said offense not more than $1,000 or be imprisoned not more than three years, or both. The possession of any copy or record of any such chance, right, or interest, or of any such ticket, certificate, bill, token,

or other device shall be prima-facie evidence that the possessor of such copy or record did, at the time and place of such possession, keep, set up, or promote, or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting, or advertising a policy lottery, policy shop, or lottery. (Mar. 3, 1901, 31 Stat. 1330, ch. 854 #863; June 30, 1902, 32 Stat. 535, ch. 1329; Apr. 5, 1938, 52 Stat. 198, ch. 72, #1.)"

Title 22, Section 1502, District of Columbia Code (1951 ed.):

"If any person shall within the District have in his possession, knowingly, any ticket, certificate, bill, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for the purpose of playing, carrying on, or conducting any lottery, or the game or device commonly known as policy lottery or policy, he shall be fined upon conviction of each said offense not more than $500 or be imprisoned for not more than six months, or both. (Apr. 5, 1938, 52 Stat. 198, ch. 72, #2.)"

Reasons for Allowing Writ

1. To what extent Rule 41 (g) Federal Rules of Criminal Procedure continues in effect *"special provisions"* for the issuance, execution and form of search warrants contained in prior Congressional Acts, is a question of general importance not heretofore decided by this Court. The same question is now before this Court in *Ledbetter* v. *United States,* No. 522 (Misc.), October Term 1953, on Petition for Writ of Certiorari. The Ledbetter decision by the United States Court of Appeals for the District of Columbia Circuit is the basis of the decision of that Court on the same point raised herein. If, even in light of Rule 41 (g) Federal Rules of Criminal Procedure, 23-301 D. C. Code is no longer the law, that final determination should be made by this Court.

2. This Court has never had occasion to pass upon the validity of a search warrant issued upon an affidavit which fails to show that affiants had any personal knowledge that contraband was concealed in the premises; where the affiants merely stated that they had observed persons enter and leave the premises; that they had a complaint that the premises were used for illegal activity but at the same time, the affiants do not say that they had any information whatsoever concerning the persons observed nor any knowledge of their purpose in entering or leaving the premises. The affidavits recited that a woman's pocketbook carried by the female observed and a brown paper bag carried by the male, contained contraband, without ascribing any reasons whatsoever for their belief. The right of a citizen to be protected against invasions of his home under the color of authority of a warrant issued under these circumstances is a question requiring an interpretation of Amendment IV of the Constitution by this Court.

3. A novel question is presented in this case in that two police officers entered premises without a warrant, taking with them into the premises an individual arrested on the outside of the premises, proceeded to arrest two persons found in the premises and initiated a search. Subsequent to these events, there arrived a Deputy United States Marshal bearing a search warrant. The question as to whether or not the entry of the Deputy Marshal with the warrant cured the patently unlawful entry and illegal arrest effected by the police officers is one that has never been decided by this Court and is one of general importance that should be decided by this Court.

4. Arrests without a warrant have been the subject of two recent decisions by the United States Court of Appeals for the District of Columbia Circuit: *Mills* v. *United States* 196 F. 2d 600 and *DeBruhl* v. *United States* 199 F. 2d. 175. In those cases that Court apparently rested its decisions

upon erroneous interpretation of opinions of this Court in *Rabinowitz* v. *United States* 339 U. S. 56, 70 S. Ct. 430, 94 L. ed. 653; *Brinegar* v. *United States* 338 U. S. 160, 69 S. Ct. 1302, 96 L. ed. 543. This case presents the question of the validity of the arrest of an individual without a warrant where officers had merely observed conduct on his part that was not suspicious and was innocent except that the officer says that he believed that a brown paper bag carried by the individual on three previous occasions contained contraband but no reasons are ever given for the belief of the officer. The question here of arrest without a warrant is one of public interest, general importance and one which this Court should decide under its inherent power to supervise proceedings in Federal criminal trials.

Statement

786 Morton Street, N. W., in the District of Columbia is a multi-unit apartment dwelling in which petitioner Susie V. Brown occupied apartment number 2. The United States Commissioner for the District of Columbia issued a search warrant for the apartment of petitioner Brown on October 14, 1952, (R. pg. 60) based upon an affidavit (R. pg. 56) that Officer Hood was sent to make an investigation of a complaint received that numbers were being written and picked up at 786 Morton Street, N. W. That on each of the three dates, September 6th, 8th, and 9th, 1952, Hood observed traffic going in and out of the said premises; that one, Larkin King, was seen to enter the premises and leave 5 minutes later carrying a brown paper bag believed to contain number slips. That on each of the dates, October 8th, 9th, and 10th, 1952, Hood observed petitioner Brown leave 786 Morton Street, N. W., make several stops in houses in the block and thereafter enter an apartment house, 3318 Sherman Avenue, N. W., remain about 10 minutes and return to 786 Morton Street, N. W. That she at all times car-

ried a black leather pocket book that an unknown man (later identified as petitioner Shay) on each of these three dates was observed to enter 786 Morton Street, N. W., remain about 5 minutes and leave carrying a brown paper bag believed to contain numbers slips. On each of the three dates Hood made numbers plays with an unidentified man and sometime thereafter observed the unidentified man enter 3318 Sherman Avenue, N. W. On October 10, 1952, Officers observed an unidentified man known as John Hall leave a filling station and enter 786 Morton Street, N. W., carrying a brown paper bag believed to contain numbers slips, remain about 5 minutes and leave without the brown paper bag. The affidavit further recited that from the above observations it was the belief of affiants that in premises 786 Morton Street, N. W., numbers paraphernalia was being secreted in violation of the lottery laws. On October 14, 1952, petitioner Shay was arrested without a warrant outside premises 786 Morton Street, N. W. (R. pg. 102) by Officers Hood and Jefferson and a leather brief case was seized from his hands. The officer had no conversation with Shay. The officers carried Shay and the brief case into Apartment 2, 786 Morton Street, N. W. (R. 17). The officers entered the premises forcibly and without a search warrant (R. pg. 98). Inside the apartment the officers found petitioner Brown and one Plummer, both were arrested. In open view, an adding machine and numbers slips were on a table. Shay's brief case was then opened and looked into by the arresting officer. (R. pg. 101). Officer Hood testified that he had observed Shay enter an alley before he saw him emerge from 786 Morton Street, N. W. (R. pg. 96); that he did not have orders to stop Shay but that he had "orders" to arrest Shay (R. pg. 97). About 5 or 10 minutes after Officers Hood and Jefferson had arrested and taken Shay into the premises, made the arrest

of Susie Brown and Plummer and observed the incriminating articles (R. pg. 101, 134), a deputy United States Marshal entered the premises for purposes of executing a search warrant directed to the United States Marshall (R. pg. 60) which he had in his possession; the search then continued. A copy of the search warrant was given to Susie Brown. It was conceded by the government that no copy of the affidavit upon which it was issued was attached to the copy of the warrant served upon Susie Brown (R. pg. 26).

Petitioners and one Plummer were charged in a four count indictment. Count one charged petitioner Brown with operation of a lottery between October 8th and 14th, 1952. Count two charged petitioner Shay with the operation of a lottery between October 8th and 14th, 1952. Count three charged co-defendant Plummer (who was acquitted) with the operation of a lottery during the same period. Count four charged Brown, Shay, and Plummer jointly with the offense of possession of lottery paraphernalia on October 14, 1952.

Prior to trial petitioner Brown filed motions to suppress evidence, for severance, and to quash her arrest (R. pgs. 5-7). Shay filed a motion to suppress evidence (R. pgs. 7-8); after hearing, all of these motions were denied. In addition, Shay's oral motion for severance was denied.

At the trial the government produced as witnesses officers Hood and Jefferson who testified *only* with respect to their observations on October 8, 9 and 10, 1952, which was substantially recited in the affidavit, the pertinent facts of which are set forth above. The seized lottery paraphernalia was introduced into evidence over the objections of petitioner (R. pg. 116.)

Both petitioners were convicted of possession of lottery paraphernalia in count four; Shay was convicted of operating a lottery in count two and Brown was convicted of operating a lottery in count one (R. pgs. 51, 52).

BRIEF IN SUPPORT OF PETITION

Argument

Point I

THE NECESSITY FOR COMPLIANCE WITH THE SPECIAL PROVISIONS CONTAINED IN 23-301 D. C. CODE REGARDING FORM, ISSUANCE AND EXECUTION OF SEARCH WARRANTS FOR VIOLATIONS OF CERTAIN SPECIFIED LAWS HAS BEEN PRESERVED BY RULE 41 (G) FEDERAL RULES OF CRIMINAL PROCEDURE SUCH THAT THE COURT BELOW ERRED IN ITS HOLDING THAT 23-301 D. C. CODE NEED NOT BE COMPLIED WITH WHEN RULE 41 FEDERAL RULES OF CRIMINAL PROCEDURE IS COMPLIED WITH.

Rule 41(g) Federal Rules of Criminal Procedure provides: "This rule does not modify any act inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which *special provision** is made".

Petitioners say that such "*special provision*" was made regulating the issuance and execution of search warrants for violations of 22-1501 and 22-1502 D. C. Code (Lottery Laws) by 23-301 D. C. Code which prescribes in detail regulations concerning search warrants issued for violations of 22-1501 and 1502 D C. Code (Lottery Laws). Inter alia, that Act provides, that the search warrant "*shall have annexed to it, or inserted therein, a copy of the affidavit upon which it is issued*".

The search warrant herein contained no copy of the affidavit, (R. pg. 60) nor was any copy of the affidavit attached to the warrant (R. pg. 26).

There is no question but that 22-301 D. C. Code was specifically designed for the regulation of the issuance, execution, etc., of search warrants for violations of the D. C. Lottery Laws. Insofar as that statute requires that

* Emphasis supplied.

a copy of the affidavit upon which it was issued be annexed or included within the warrant, it is inconsistent with subsection (c) of Rule 41 Federal Rules of Criminal Procedure which requires only that the warrant state the grounds or probable cause upon which it is issued.[1]

The Court below in its opinion (R. pg. 178) in their case said:

> "Of the several contentions raised on these appeals, the only one that would otherwise require discussion relates to the form and execution of search warrants and is answered by *Ledbetter* v. *United States*, No. 11,786, U. S. App. D. C., Decided Feb. 4, 1954. As we held in that case, D. C. Code (1951) 23-301 need not be complied with when Rule 41 of the Federal Rules of Criminal Procedure is complied with."

Petitioners urge upon this Court the proposition that the Court of Appeals ruled in this instance directly against the plain meaning of the language in Rule 41(g) Federal Rules of Criminal Procedure. Petitioners say that the United States Court of Appeals for the District of Columbia has in effect, held that the Act of Congress known as Title 23 Section 301 D. C. Code is no longer law. Petitioners believe sincerely that this is an instance of judicial repeal of an Act of Congress which should be forthwith corrected by this Court.

Petitioner Brown specifically raised this question before trial in her motion to suppress. It is perhaps pertinent here to note that the Ledbetter decision of the United States Court of Appeals for the District of Columbia upon which

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[1] Petitioners say also that the warrant herein (R. pg. 60) did not state the grounds or probable cause for its issue as required by Rule 41 (c) but stated mere, bare, naked conclusions so that even if compliance with Rule 41 Federal Rules of Criminal Procedure were all that was necessary, the warrant was still fatally defective.

See: *Byars* v. *United States*, 273 U. S. 28; 71 L. Ed. 520;
Grau v. *United States*, 287 U. S. 124; 77 L. Ed. 212.

that Court relied in its decision of their case is also now before this Court on petition for Writ of Certiorari (*Ledbetter* v. *United States*, Misc., No. 522 Oct. Term 1953).

The Notes of The Advisory Committee on Rules indicate that such *special* provisions as are contained in 23-301 D. C. Code are not only not repealed, but preserved by Rule 41(g) Federal Rules of Criminal Procedure.

> "While Rule 41 supersedes the general provision of 18 U. S. C. par. 611-626 (now in part par. 3105, 3109) relating to search warrants, *it does not supersede*, but preserve, all other statutory provisions permitting searches and seizures in specific situations . . ."

This question involving an apparent conflict between two United States statutes regulating search warrants and the interpretation of Rule 41(g) Federal Rules of Criminal Procedure is one of general importance and public interest and is one to be finally resolved by their Court.

Point II

PROBABLE CAUSE IS NOT SHOWN BY AN AFFIDAVIT UPON WHICH A SEARCH WARRANT IS ISSUED WHICH RECITES THE "BELIEF" OF AFFIANTS THAT THE OTHERWISE INNOCENT CONDUCT OBSERVED IS ILLEGAL WITHOUT ASCRIBING ANY REASON FOR, OR GIVING ANY FACTS IN SUPPORT OF SUCH *"BELIEF"* WHEN THE SOLE BASIS FOR THE ISSUANCE OF THE WARRANT IS THE OBSERVED CONDUCT.

Counsel, through their research have been unable to discover any decision of this Court involving the question as to whether or not probable cause is shown by a recital of observations of otherwise innocent conduct plus a "belief" on the part of the affiant that the otherwise innocent conduct observed was not in fact innocent but illegal, where no reasons are given for such belief.

The facts supporting the issuance of the search warrant for premises of Petitioner Brown concern themselves primarily with observations by affiants of the activities of

petitioners on three days only (R. pg. 56). The facts set forth in the affidavit show acts and conduct of petitioner and three other persons. These activities were in and of themselves absolutely innocent and non-suspicious. The individuals were not known to the officers as persons who were engaged in any sort of illegal operation nor were the individuals observed to violate any law insofar as the officers had any knowledge of any sort. Petitioner Susie V. Brown carried her black leather pocketbook at all times when she was observed. Certainly there is nothing even suspicious about a woman carrying a pocketbook. Still, the affiants stated that they *believed* that the paper bags contained numbers slips. Again, no reason whatsoever was given as to the basis of such belief.

The sufficiency of the facts before the Commissioner upon which he issued the search warrant therefore resolve themselves to a question as to whether or not probable cause is shown by observation of otherwise innocent conduct coupled with a recitation of a "belief" which if well founded, would cause such conduct to be illegal.

Petitioners say that the "belief" of the observing officers could not possibly show probable cause when no attempt was made to show, how, why, or in what manner the officers arrived at their "belief". A search warrant may be issued only upon *FACTS* showing probable cause. No such facts were shown in the affidavit here. True enough an officer made a numbers "play" or bet with an unidentified man but there was absolutely no connection between this unidentified man and Brown's premises. Indeed, this unidentified man was observed to enter an apartment building on Sherman Avenue such that if there was probable cause to believe that lottery slips were concealed anywhere it would be with the Sherman Avenue apartment building. Petitioner Brown entered the Sherman Avenue Apartment

building but it was not known or shown what apartment therein she entered.

This Court has established a standard for the determination as to whether or not an affidavit shows probable cause in *Dumbra* v. *United States* 268, U. S. 435; 69 L. Ed. 1032 at page 1036.

> "We are concerned only with the question whether the affiant had reasonable grounds at the time of his affidavit and the issuance of the warrant for the belief that the law was being violated on the premises to be searched; and if the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a warrant."

Plainly, the affidavit here fell far short of that standard. A reading of the affidavit would not disclose to the reader any reasonable grounds to believe that lottery paraphernalia was concealed in the apartment of Mrs. Brown.

If the complaint is made on information and belief, it must give grounds of belief and sources of information. *Worthington* v. *United States* 166 F. 2d 557.

A search conducted in violation of the Constitution can never be made lawful by its fruits. *Byars* v. *United States* 273 U. S. 28; *United States* v. *De Ri* 332 U. S. 581.

In the present case petitioner Brown would have been entitled to a judgment of acquittal if the wrongfully seized evidence had been excluded. The only evidence against her on either count was the finding of the incriminating articles in her apartment.

It was error for the District Court to deny Brown's motion to suppress the evidence.

Point III

THE SUBSEQUENT EXECUTION OF A SEARCH WARRANT IN PREMISES ENTERED ILLEGALLY AB INITIO COULD NOT LEGALIZE THE ARRESTS EFFECTED AS A RESULT OF THE ILLEGAL ENTRY AND THE EVIDENCE SEIZED AS A RESULT THEREOF.

The premises of petitioner Brown were entered by Officers Hood and Jefferson without a warrant. The officers carried petitioner Shay into Brown's apartment along with them. Shay had been just arrested outside the premises without a warrant. When inside the premises the officer observed numbers slips, an adding machine and other lottery paraphernalia in open and plain view. These officers arrested petitioner Brown and one Plummer (co-defendant later acquitted) inside the apartment after making their identity known as police officers (R. pg. 98). Plummer and petitioner Brown were compelled to remain in their respective positions (R. pg. 102). The entry of Officers Hood and Jefferson into the premises without a warrant cannot be justified by the arrival of a deputy United States Marshal with a search warrant some 10 minutes later. Petitioner Brown moved seasonably to suppress as evidence anything seized as a result of the illegal entry of Officers Hood and Jefferson. (R. pg. 5). The motion was denied and Officers Hood and Jefferson were permitted to testify at the trial as to their observations within premises to the great prejudice of petitioners. The "*thing*" found as a result of this illegal entry was the observation of the presence of petitioner Brown together with her position behind the table on which there was an adding machine and the lottery paraphernalia in a very incriminating position. Not only physical objects may be suppressed as evidence. In *Nueslein* v. *District of Columbia*, 73 App. D. C. 85, 115 F. 2d 690 the late Chief Justice Vinson who was then a judge

of the United States Court of Appeals for the District of Columbia, speaking for the Court said:

> "The crucial thing "found" in this "search" was the declaration of the fact by the defendant that has become decidedly incriminating."

In that Case the Court held that admissions of a defendant obtained after an unlawful entry into his home should be suppressed as evidence. In this case, although the record is not clear on this point, it appears that petitioner Brown was arrested because of the observations by the officers of the lottery paraphernalia. The arrest cannot be justified by this observation for the reason that the officers had placed themselves in a position to observe by illegal means. *MacDonald* v. *United States* 335 U. S. 451, 93 L. ed. 153.

Some 5 to 10 minutes later Officer Hood admitted other officers (R. pg. 103) and a deputy United States Marshal into the premises. The deputy Marshal had a search warrant previously issued for the search of the premises. Officers Hood and Jefferson at no time claimed in their testimony that their entry into Brown's premises was for the purpose of assisting one who had a search warrant for the premises. Title 18 Section 3105, United States Code provides:

> "§ 3105. Persons authorized to serve search warrant.
> A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution."

There is no question but that the entry of Hood and Jefferson was illegal, not being made to assist the deputy Marshal in the execution of a search warrant. Further, 18-3105 United States Code indicates one who assists in the execu-

tion of a search warrant *must* do so at a time when the officer having the warrant is "PRESENT AND AIDING in its execution." This condition did not obtain here.

Petitioners say, therefore, that they were prejudiced by the testimony of Hood and Jefferson as to the testimony of matters observed as a result of their illegal entry. (R. pg. 17). Petitioner Brown was prejudiced by the admission into evidence of objects observed in her premises at the time and part and parcel of her illegal arrest.

This Court said in *McDonald* v. *United States*, supra:

> "We are not dealing with formalities. *The presence of a search warrant serves a high function.** Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that Constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the Constitutional mandate the exigencies of the situation made of that course imperative."

The arrest of petitioner Brown could not have been effected by Hood and Jefferson unless and until observation of the incriminating objects inside her premises which had been *ab initio* entered illegally.

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* Emphasis supplied.

The subsequent execution of the search warrant on these premises could not possibly cure the illegal arrest of Brown nor could the execution of the warrant permit use of evidence in the form of the testimony concerning matters observed within the premises as a result of the illegal entry.

Point IV

THE ARREST OF PETITIONER SHAY WITHOUT A WARRANT WAS ILLEGAL AND UNREASONABLE UNDER ALL OF THE CIRCUMSTANCES.

Petitioner Shay was arrested on October 14, 1952, by officers Hood and Jefferson outside premises 786 Morton Street, N. W. At the time of his arrest Shay was carrying a leather brief case and had just emerged from the apartment building 786 Morton Street, N. W. In an affidivit in support of an application for a search warrant for apartment 2, of this building officer Hood stated:

> "Having received a complaint that numbers were being written and picked up at 786 Morton Street, N. W., Wash., D. C., Officer Virgil J. Hood, MPDC, Morals Division, was sent to make an investigation." (R. pg. 56)

With reference to petitioner Shay the affidavit had only this further to say:

> "At about 2:35 p. m., same date, we observed a colored man, about 5'9", medium brown skin, small mustache, 165 lbs, about 35 yrs of age, driving a 1951 Buick Sedan, D. C. Tag K-363, park in front of premises 786 Morton Street, N. W., get out of his car and enter Apt. 2 of this address, remain about 5 minutes, and upon his return he was carrying a small brown paper bag in his right hand which we believe to contain number slips. This colored man then got in his car, drove east on Morton Street, N. W., where we discontinued observation."

* * * * *

"About 1:45 p. m., October 9th and 10th, 1952, Officers Virgil J. Hood and Burtell M. Jefferson went to make observations and observed the . . . driver of the 1951 Buick D. C. Tag K-363, go through the same procedure as outlined on October 8th, 1952." (R. pg. 58)

This above was ALL of the information concerning Shay possessed by the arresting officers. By no stretch of the imagination could this information be considered "probable cause" within the meaning of the Constitution for the arrest of Shay without a warrant. It is to be noted that according to the affidavit Shay had been seen to carry a brown paper bag which the officers *"believed"* to contain numbers slips on October 8, 1952, and that on October 9th and 10th, 1952, Shay went through the same procedure as on October 8th. As urged elsewhere in this brief, no reasons whatsoever were ever given for the *"belief"* of the officers. Petitioners therefore say that there was no reasonable basis for the belief that premises 786 Morton Street, N. W., Apartment 2, were used to conceal lottery paraphernalia. But assuming, arguendo, that the officers had reasonable grounds to believe that these premises were used to conceal lottery paraphernalia there was still no legal or rational basis for Shay's arrest. The affidavit recited that the brown paper bag that Shay was observed to carry was *"believed"* to contain numbers slips. At the time of his arrest *Shay did not carry a Brown Paper Bag.* The fact that in the brief case he carried lottery slips were found cannot justify the arrest nor the search.

The proposition herein urged by petitioner Shay is as follows:

The conduct and activity of Shay observed by the officers was in and of itself entirely innocent. There was nothing suspicious about Shay's conduct. There was no conver-

sation between the officers and Shay as was true in *Brinegar* v. *United States,* 338 U. S. 160, 69 S. Ct. 1302, 92 L. ed. 543 such as to give rise to probable cause. If the officers had given some reason for their "belief" that Shay carried numbers slips at the time of his arrest then, naturally, there would have been some justification for Shay's arrest but as aforesaid no such reasons were given.

The arresting officers had *"orders"* to arrest Shay. If orders had been given surely there was ample time to secure an arrest warrant but this was not done. This has some bearing on the "reasonableness" of the arrest; it is a circumstance to be considered.

Arrest without a warrant in somewhat similar circumstances have been upheld by the United States Court of Appeals for the District of Columbia Circuit in *Mills* v. *United States,* 196 F. 2d 600, and *De Bruhl* v. *United States,* 199 F. 2d. 175. However, in those cases in the instance of *Mills,* the officers had information that Mills was picking up numbers plus a description of his automobile and when accosted by the officers and questioned concerning his activity Mills made no reply but *"just sort of grinned"*. Mills handed to the officers upon their request, a bag of numbers slips. The officer placed Mills under arrest, *"As soon as I saw those numbers slips."* These conditions were not present in the case of Shay here. Likewise, in the *De Bruhl* case the officers had positive information concerning the lottery activity of De Bruhl; also when approached by the officers and questioned, De Bruhl made certain incriminating statements. In the case of Shay these factors were not present.

The question is, how far may officers go in arresting citizens because of an unsupported *"belief"* after observation of otherwise innocent conduct? Petitioners have found no case exactly in point with the situation here. The

nearest approach is found in the *Mills* and *De Bruhl* cases supra and as aforesaid these cases are distinguishable. Petitioner says further that both of these decisions are based upon erroneous interpretations of the opinions of this Court in *Rabinowitz* v. *United States*, 339 U. S. 56, 70 S. Ct. 430; 94 L. ed 653; and *Brinegar* v. *United States*, 338 U. S. 160, 69 S. Ct. 1302, 92 L. ed. 543. Petitioner urges this Court, therefore to finally determine the extent to which officers may arrest without a warrant in circumstances of this sort. The arrest of Shay under all of the circumstances was unreasonable.

Conclusion

It is respectfully submitted that the questions raised herein indicate grave errors relative to novel questions not heretofore decided by this Court and that they warrant exercise of this Court's supervisory jurisdiction by issuance of a Writ of Certiorari.

Respectfully Submitted,

De Long Harris,
Curtis P. Mitchell,
Counsel For Petitioners.

(4551)

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 704

JAMES SHAY AND SUSIE V. BROWN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the Court of Appeals (R. 177-178) is not yet reported.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on February 19, 1954 (R. 179). By order of the Chief Justice, the time for filing a petition for

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[1] The court in its opinion refers to and relies upon its earlier decision in *Ledbetter* v. *United States*, No. 11786, decided February 4, 1954 (not yet reported), in which a petition for a writ of certiorari was denied May 24, 1954, No. 522 Misc.

a writ of certiorari was extended to and including April 20, 1954, and the petition for a writ of certiorari was filed on that date. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether failure to attach to the copy of a validly issued search warrant left at the premises searched the affidavit upon which the warrant was issued rendered the search invalid.

2. Whether there was a sufficient showing of probable cause (1) for the issuance of the search warrant and (2) for the arrest of Shay without a warrant.

3. Whether after the issuance of a search warrant, the entry of two members of the searching party, shortly in advance of the officer who had a copy of the warrant, rendered the search invalid.

STATUTES AND RULE INVOLVED

The pertinent provisions of the D. C. Code are:

> Sec. 22-1502. If any person shall within the District have in his possession, knowingly, any ticket, certificate, bill, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for the purpose of playing, carrying on, or conducting any lottery, or the game or device commonly known as policy lottery or policy, he shall be fined upon conviction of each said offense not more than $500 or be imprisoned for not more than six months, or both.

Sec. 23-301. Upon complaint, under oath, before the police court, or a United States commissioner, setting forth that the affiant believes and has good cause to believe that there are concealed in any house or place articles stolen, taken by robbers, embezzled, or obtained by false pretenses, forged or counterfeited coins, stamps, labels, bank bills, or other instruments, or dies, plates, stamps, or brands for making the same, books or printed papers, drawings, engravings, photographs, or pictures of an indecent or obscene character, or instruments for immoral use, or any gaming table, device, or apparatus kept for the purpose of unlawful gaming, or any lottery tickets or lottery policies, or any book, paper, memorandum, or device for or used in recording any bet or deposit of money or thing or considerations of value received for any share, ticket, certificate, writing, bill, slip, or token in any pool or lottery or as a wager on or in connection with any race, game, contest, election, or other gambling transaction or device of an unlawful nature as defined in sections 22-1501, 22-1503, 22-1504, 22-1505, 22-1507, 22-1508, particularly describing the house or place to be searched, the things to be seized, substantially alleging the offense in relation thereto, and describing the person to be seized, the said court or United States commissioner may issue a warrant either to the marshal or any officer of the Metropolitan Police commanding him to search such house or place for the property or other things, and, if found, to bring the same, together with the person to be seized,

before the police court or United States commissioner issuing said warrant, as the case may be.

The said warrant shall have annexed to it, or inserted therein, a copy of the affidavit upon which it is issued, and may be substantially in the form following:

"Whereas there has been filed before ——— an affidavit, of which the following is a copy (here insert). These are therefore to command you to enter (here describe the place) and there diligently search for the said articles, goods, or chattels in the said affidavit described, and that you bring the same, or any part thereof, found on said search and also the body of ——— before the police court, or United States commissioner, as the case may be, to be dealt with and disposed of according to law."

Rule 41, F. R. Crim. P. ("Search and Seizure") provides in part:

(c) *Issuance and Contents.* A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof

or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. * * *

(d) *Execution and Return with Inventory.* The warrant may be executed and returned only within 10 days after its date. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. * * *

* * * * *

(g) *Scope and Definition.* This rule supersedes the Act of June 15, 1917, c. 30 title XI, Secs. 1-6, 10, 11, 12-16, 40 Stat. 228, 229, 18 U. S. C. Secs. 611-616, 620, 621, 623-626, and any other provision of chapter 30 of that Act inconsistent with this rule. It does not modify any other act, inconsistent with this rule, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The term "property" is used in this rule to include documents, books, papers and any other tangible objects.

STATEMENT

Petitioners were convicted on March 10, 1953 (R. 47-48), in the United States District Court for the District of Columbia of carrying on a numbers game from October 8 to October 14, 1952 (counts

1 and 2, R. 3-4) and of knowingly possessing numbers slips (count 4, R. 4). Brown was sentenced to a term of imprisonment of three to twelve months on count 1 and to a fine of $250 on count 4. The sentence on count 1 was suspended and Brown was placed on probation for a period of two years. (R. 51.) Shay was sentenced to consecutive terms of imprisonment of three to twelve months on count 2 and thirty days on count 4 (R. 52).[2] On appeal, the judgments were affirmed by the Court of Appeals (R. 179).

Prior to trial, petitioner Brown moved unsuccessfully (R. 46-47) to suppress certain property seized under a search warrant from her apartment located at 786 Morton Street, N. W., Apartment 2, Washington, D. C., on the grounds *inter alia* (1) that a copy of the affidavit which formed the basis of the search warrant was not attached to the copy of the warrant which was served on her (R. 5-6, 9-10), (2) that the affidavit did not state sufficient facts to constitute probable cause (R. 28), and (3) that in the execution of the search warrant, officers Hood and Jefferson, who were the first members of the searching party to enter the apartment, did not have a copy of the warrant with them (R. 27). Shay likewise moved unsuccessfully (R. 46-47) to suppress the property seized from his person on the ground that his arrest without a warrant and the

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[2] Shay commenced serving his sentence on May 8, 1953, but on May 29, 1953, was released on bail pending appeal. His bail was revoked (R. 175-176) and he returned to prison on February 25, 1954, where is he now serving his sentence.

subsequent search of his person were illegal (R. 7-8, 10-11).

The evidence adduced at the hearing on the motion to suppress and at the trial may be summarized as follows:

Acting upon information that numbers operations were being conducted in an apartment at 786 Morton Street, N. W., Washington, D. C. (R. 56), Metropolitan Police officers were assigned to observe the premises (R. 13). During intermittent observations in September 1952 (R. 13, 77), the officers noted several persons enter the apartment separately, among them John Hall and Larkin King, who were not defendants in this case. Hall and King would enter the premises between 2:00 and 3:00 p. m. and leave shortly thereafter. They carried brown bags which were believed to contain numbers slips. (R. 18-19, 56-57, 65, 77-80.) Some time before October 14, 1952, the date of Shay's arrest and the search of Brown's apartment, King was arrested on a lottery charge (R. 18, 136).[3] Although King's activities thereupon ceased, Hall's continued (R. 18-19, 59).

On October 8, 9, 10 and 11, 1952, the officers saw co-defendant Brown, who lived at 786 Morton Street, leave the apartment building and walk east on Morton Street. She made three stops on that street. After her last stop, she went back through an alley off Morton Street, came out on Sherman Avenue, N. W., and walked to an apartment house in the 3300 block of Sherman Avenue. She entered

[3] This charge against King was later dismissed (R. 136).

through the front door of this building and within a short time left through the back door. Thereafter she returned to her own apartment at 786 Morton Street. During this time, she carried a black leather pocket book. (R. 13-14, 22, 57-58, 65, 66, 67, 72, 90.)

On these same days, at about 2:35 or 2:45 p. m., Shay drove to the Morton Street address. He did not carry anything into the building, but when he left five or ten minutes later he carried a brown paper bag which was believed to contain numbers slips. (R. 14-15, 19, 58, 66, 72, 75.) This activity of Shay indicated to the officers that he was a replacement for King as the pick-up man (R. 18-19).

On October 9, 10, 11 and 14, 1952, officer Hood placed numbers bets in the vicinity of Sherman Avenue and Morton Street with an unidentified man who, on each occasion after the bet was placed, went into the Sherman Avenue apartment building (R. 58-59, 67-68, 71-73, 80-81, 85-86).

Upon the basis of the foregoing observations, the officers believed that a numbers business was in operation at the Morton Street address (R. 55). Accordingly, they executed an affidavit which set forth their observations in detail and their conclusions therefrom that Brown and Shay as well as the other persons whom they observed were operating a lottery and that numbers paraphernalia were secreted in the premises of 786 Morton Street, N. W., Apartment 2 (R. 56-59). On October 14, 1952, they secured a search warrant for the premises (R. 60-61).

As part of a prearranged plan to execute the warrant, officers Hood and Jefferson arrived about 2:00 p. m. in the vicinity of the Morton Street premises. They were instructed to arrest Shay, to observe the Morton Street premises, and to notify the rest of the searching party who were in another cruiser in another area and who had a copy of the warrant in their possession when these activities began, presumably so that they could begin the search at the right time. (R. 33, 35, 97, 100, 102.)

When they saw Shay drive into the alley leading to the rear of the Morton Street premises, they immediately contacted the rest of the searching party in accordance with their prearranged plan and then left their car (R. 35, 100). When they arrived at the Morton Street apartment, Shay, carrying a brief case, was leaving the Brown apartment on the first floor (R. 16, 82, 83, 98, 100). They identified themselves and arrested Shay. (R. 16, 98, 101.) They did not have a warrant for his arrest (R. 101). They took the brief case from him and took him into Brown's apartment through the door, which was open (R. 16, 98, 101). Upon entering the apartment they found Brown and Plummer, identified themselves as officers, told Brown that there was a search warrant for the premises, and asked those present to remain where they were until the rest of the searching party arrived (R. 30-31, 76-77, 98, 102). Five or ten minutes later, the rest of the searching party, including the deputy marshal who had a copy of the search warrant, arrived (R. 37, 40, 101, 103, 104, 122-123).

The copy of the warrant, which did not have attached to it the affidavit upon which it was issued, was served upon Brown (R. 34, 38).

Thereafter, the officers searched the apartment (R. 38) and seized the numbers slips and books, money, unused coin wrappers, numbers dream books and other numbers paraphernalia (R. 61-62, 109-111) which were admitted in evidence at petitioners' joint trial, over their objections (R. 110, 111). The officers also searched Shay and his brief case at the apartment and found numbers slips, run-down tapes, duplicate receipts for the numbers played by the officer, and money (R. 61-62, 104-108, 112, 113, 114, 115, 116). When questioned by the police, Brown acknowledged that the numbers books were hers (R. 110), but Shay refused to make any statement about the numbers paraphernalia found in his brief case (R. 107). This evidence was also admitted at the trial over petitioners' objections (R. 107, 108, 116-117).

ARGUMENT

1. Petitioners contend (Pet. 11-13) that the court below erred in holding that Rule 41, F. R. Crim. P.—which was complied with here and which, as petitioners necessarily concede (Pet. 12), does not require search warrants to include therein copies of the affidavits which form the bases of their issuance—superseded 23 D. C. Code 301. Petitioners relied upon this latter provision for their assertion that the search of Brown's apartment was invalid because a copy of the affidavit was not

attached to the copy of the warrant served upon Brown.[4] The same contention was rejected by the court below in *Shaw* v. *United States*, 209 F. 2d 298 (C. A. D. C.), in which this Court denied certiorari on February 1, 1954 (347 U. S. 905), and in *Ledbetter* v. *United States* (No. 11786 in the court below, decided February 4, 1954), petition for certiorari denied May 24, 1954, No. 522 Misc.,[5] and was raised in petitioner Shay's application for bail which was denied by the Chief Justice on March 11, 1954. We think it clear that the argument does not warrant review by this Court.

It is undisputed that, as in *Shaw* and *Ledbetter*, *supra*, the provisions of Rule 41(c)—that the warrant shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof—were

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[4] Shay did not assert any interest in Brown's apartment or the property seized therefrom. For this reason he had no standing to move for the suppression and return of such property. Rule 41(e), F. R. Crim. P.; *Goldstein* v. *United States*, 316 U. S. 114, 121; *Agnello* v. *United States*, 269 U. S. 20, 35; *Gibson* v. *United States*, 149 F. 2d 381, 384 (C.A. D.C.), certiorari denied *sub nom. O'Kelley* v. *United States*, 326 U. S. 724; *Shore* v. *United States*, 49 F. 2d 519 (C.A. D.C.), certiorari denied, 283 U. S. 865; cf. *United States* v. *Jeffers*, 342 U. S. 48. But since codefendant Brown moved unsuccessfully for the suppression and return of this property (R. 5-6, 46-47), the evidence was admitted against both Shay and Brown at their joint trial. In these circumstances, Shay is entitled to assert error in the denial of Brown's motion, particularly in respect of count 4, which charged them jointly with possession of the numbers slips and other items found in the search of Brown's apartment. *McDonald* v. *United States*, 335 U. S. 451, 456.

[5] To the same effect are the decisions of the court below on April 1, 1954, in *Turner* v. *United States* (No. 11918) and *Lee* v. *United States* (No. 11920) (not yet reported).

meticulously observed in this case. It is likewise undisputed that neither Rule 41(c) nor the Fourth Amendment requires that the supporting affidavits be attached to the search warrant. In fact, Rule 41(c) clearly negates any such requirement by specifically providing that the warrant "shall state * * * the names of the persons whose affidavits have been taken in support thereof."

Petitioners point out, however, that in subsection (g) Rule 41 provides that it "does not modify any other act, inconsistent with this rule, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made." They argue from this that the warrant in this case, although it complied fully with Rule 41 and the Fourth Amendment, was invalid because it did not have attached the affidavit upon which it was issued, as required by Section 23-301 of the D. C. Code, dealing with searches and the issuance of warrants in lottery cases. It should be noted that this contention concerns the kind of local law enforcement problem in the District of Columbia on which this Court has declined to interfere with rules fashioned by the Court of Appeals "save in exceptional situations where egregious error has been committed." *Fisher* v. *United States*, 328 U. S. 463, 476-477. But the argument for certiorari fails in any event, for it is apparent that in the circumstances of this case there is no inconsistency between Rule 41 and D. C. Code Section 23-301 which affords petitioners any basis for complaint.

The asserted inconsistency relates solely to the contents of the warrant, in that Section 23-301 provides for annexation of the affidavits to the warrant while Rule 41(c) does not. It by no means follows that failure to *serve* copies of the affidavits as part of the search warrant would invalidate the search under Section 23-301. The original warrant included an annexed copy of the affidavit upon which it was based, and this is all that Section 23-301 requires. The copy of the warrant served on Brown referred to the affidavit, which undoubtedly was available to her if she had wished to examine it.

2. Equally unsubstantial are petitioners' assertions (Pet. 13-15, 19-22) that there was no probable cause for the issuance of the search warrant and for the arrest of Shay without a warrant. These contentions are based upon the fact that officers Hood and Jefferson, who executed the affidavit upon which the search warrant was based and who arrested Shay, did not have personal knowledge that the Morton Street premises were in fact used to carry on a numbers business or used for any illegal purpose and that Shay was in fact a participant therein. But by its very definition probable cause does not require such knowledge. *Brinegar* v. *United States*, 338 U. S. 160; *Dumbra* v. *United States*, 268 U. S. 435. It "exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed."

Brinegar v. *United States, supra,* at 175-176, quoting from *Carroll* v. *United States,* 267 U. S. 132, 162. To experienced officers the activities of Shay and Brown in the vicinity of the Morton Street address clearly constituted reasonable cause to believe that numbers were being written and picked up at the Morton Street address, as had been reported, and that Shay and Brown were participants in the numbers operations. Over an extended period of several days prior to the issuance of the search warrant on October 14, 1952, Brown left her apartment, made some stops on Morton Street, went into the Sherman Avenue premises, and then returned to her apartment, always carrying with her a black leather pocket book. At approximately the same time each afternoon, Shay drove to the Morton Street address, went into the building empty handed, and departed a few minutes later carrying a brown paper bag. These activities coincided with similar daily activities of King and Hall which the officers had observed over a period of several weeks. Shay appeared in the picture after King's arrest on a lottery charge and King's subsequent disappearance from the scene. In addition, during the period of Shay's daily visits to the Morton Street address, officer Hood placed bets with an unidentified person who immediately went into the Sherman Avenue premises which Brown visited every day on her rounds from her Morton Street apartment.

These facts clearly constituted probable cause for the issuance of the warrant. *Washington* v.

United States, 202 F. 2d 214 (C. A. D. C.), certiorari denied, 345 U. S. 956. Likewise, they constituted probable cause for Shay's arrest without a warrant. *DeBruhl* v. *United States,* 199 F. 2d 175 (C.A. D.C.), certiorari denied, 344 U.S. 868; *Mills* v. *United States,* 196 F. 2d 600 (C. A. D. C.), certiorari denied, 344 U. S. 826; *Newyahr* v. *United States,* 177 F. 2d 658 (C. A. D. C.), certiorari denied, 338 U. S. 936; *Shettel* v. *United States,* 113 F. 2d 34 (C. A. D. C.); *Maghan* v. *Jerome,* 88 F. 2d 1001 (C. A. D. C.).

3. The search of Brown's apartment was not invalid because officers Hood and Jefferson, who did not have a copy of the outstanding search warrant, preceded the rest of the searching party in entering the premises by some five or ten minutes (see Pet. 16-19). It is not essential to a valid search that a copy of the warrant be served immediately upon entry of the searching officers or that they have possession of it at the time of entry. It is not even necessary that the warrant be served prior to the seizure of the evidence, as was done in this case. *Nordelli* v. *United States,* 24 F. 2d 665 (C. A. 9); *United States* v. *Kaplan,* 286 Fed. 963 (S. D. Ga.). It is sufficient that a valid warrant is outstanding and is served. After Shay was arrested just outside Brown's apartment the officers had no choice but to take Shay into the apartment. For the door to the apartment was open and the occupants, Brown and Plummer, had undoubtedly become aware of the impending search. In order to preserve the evidence, Hood and Jefferson had to

go into the apartment, notify the occupants of the existence of the warrant, and watch over the premises, as they did, until the rest arrived. To contend that this was not a search pursuant to a warrant ignores the exigencies of the situation and imposes unrealistic standards upon law enforcement officers.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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